LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 16 1964
JOHN F. DAVIS, CLERK

No. 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Petitioner*

v.

UNITED AIR LINES, INC., *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

EDWARD J. HICKEY, JR.
JAMES L. HIGHSAW, JR.
620 Tower Building
Washington 5, D. C.
Counsel for Petitioner Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes

Of Counsel:

MULHOLLAND, HICKEY & LYMAN
620 Tower Building
Washington 5, D. C.

October 16, 1964

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
REPLY TO BRIEF OF RESPONDENT UNITED AIR LINES	2
I. Reply to United's Argument That the Brotherhood-Capital Agreement Did Not Survive the United-Capital Merger	3
A. United's Argument That the Brotherhood-Capital Agreement Did Not Survive the Merger as a Matter of Federal Law	4
1. United's argument that the imposition of employee protective conditions by the Civil Aeronautics Board in approving the United-Capital merger satisfied the objectives of national labor policy underlying the decision in Wiley & Sons	4
2. United's argument that the Brotherhood-Capital agreement did not survive the United-Capital merger because there was a substantial change in the employing enterprise	7
3. United's argument that the arbitration provisions of the Brotherhood-Capital agreement cannot be enforced because the Brotherhood has abandoned the right to arbitrate thereunder	9
4. United's argument that the Brotherhood-Capital agreement did not survive the merger because of provisions of that agreement	12
B. United's Argument That the Brotherhood-Capital Agreement Did Not Survive the Merger as a Matter of Contract Law	13
1. United's argument based on provisions of the Brotherhood-Capital agreement	13
2. United's argument that it did not assume the obligations of the Brotherhood-Capital agreement in the merger contract	15

Page

II. Reply to United's Argument That the Court of Appeals Was Correct in Finding That the District Court Had No Jurisdiction Over the Subject Matter of the Complaint 16

A. United's Argument That the Dispute Between the Brotherhood and United Is Not Justiciable 16

B. United's Argument That There Is No Federal Jurisdiction Because of the Minority Status of the Brotherhood 22

C. United's Argument That the Question of the Applicability of the Brotherhood-Capital Agreement After the Merger of Capital Into United Should Have Been Left With the Court of Appeals for the District of Columbia Circuit 25

REPLY TO MEMORANDUM FOR THE UNITED STATES 27

A. The Decision in Wiley & Sons Does Not Preclude the Grant of Relief Requested by the Brotherhood 28

B. The Merger Contract Provided That United Would Assume All The Debts, Liabilities and Duties of Capital 29

C. Delaware Law Required United to Assume the Obligations of the Brotherhood-Capital Agreement 30

D. The Brotherhood-Capital Agreement Itself Provided That It Should Be Binding Upon United 31

E. Limiting the Brotherhood's Relief Would Defeat the Objectives of Federal Law 32

F. Limiting of the Brotherhood Relief Would Be Inconsistent With Established Practices Under the Railway Labor Act 33

G. United Should Be Required to Negotiate With the Brotherhood Under Article 1(b) of the Brotherhood-Capital Agreement 34

CONCLUSION 36

INDEX TO CITATIONS

Cases:	Page
City of Nashville v. United States, 155 F. Supp. 98 (D.C. M.D. Tennessee, Nashville Division, 1957), aff'd Per Curiam 355 U.S. 63	6
Colonial-Eastern Acquisition Case, 23 C.A.B. 500 (1956)	6
Holman v. Southern Airways, Inc., 210 F. Supp. 407	27
International Association of Machinists v. Central Airlines, 372 U.S. 682	24
John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964), 11 L. Ed. 2d 898, 904, 905, 313 F. 2d 52, 56, 203 F. Supp. 171	4, 7, 8, 12, 13, 16, 21, 22, 24, 28, 30, 31, 32, 33, 34
Norfolk & Western Railway Company—Virginian Railway Company—Merger, 307 I.C.C. 401	6
Ruby v. American Airlines, 323 F. 2d 248 (CA 2, 1963), *cert. den.* 376 U.S. 913	21
Southern Pilots Assoc. v. CAB, 323 F. 2d 288, *cert. den.* 376 U.S. 954	27
Virginian Railway Company v. System Federation, 300 U.S. 515	23
Wackenhut Corporation v. International Union, United Plant Guards of America, 332 F. 2d 954	15

Statutes:	
Federal Aviation Act (49 U.S.C.A., Sec. 1301 et seq.)	5
Interstate Commerce Act (49 U.S.C.A., Section 5(2)(f))	5
Judicial Code (28 U.S.C.A., Section 1332)	24
Labor-Management Relations Act (29 U.S.C.A., Sec. 151 et seq.)	22, 23
Railway Labor Act (45 U.S.C.A., Sec. 151 et seq.)	2, 11, 13, 18, 22, 23, 28, 31, 35

Miscellaneous:	
"Administration of the Railway Labor Act by the National Mediation Board, 1934-1957", pages 24 and 25	18
Delaware General Corporation Law	30
New York Stock Corporation Law	30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 31

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Petitioner*

v.

UNITED AIR LINES, INC., *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

REPLY BRIEF FOR PETITIONER

The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, petitioner in the above-entitled cause, submits this reply to the brief of respondent and the memorandum of the United States as *amicus curiae*.

REPLY TO BRIEF OF RESPONDENT UNITED AIR LINES

The primary thrust of United's brief is not directed to sustaining the judgment of the Court of Appeals upon the ground set forth by that Court. Both the District Court and the Court of Appeals held that the Federal courts did not have jurisdiction of the subject matter of the complaint because it related to a dispute between the Brotherhood and United as to who are the representatives under the Railway Labor Act of certain of the employees of United so that exclusive jurisdiction of the subject matter is vested in the National Mediation Board under Section 2, Ninth of the Railway Labor Act. (R. 129, 136, 137.)

United now concedes that neither the Court of Appeals nor the District Court had suggested that the National Mediation Board could determine the question of the applicability of the Brotherhood-Capital agreement. (Resp. Br. 30.) It argues, however, that this Court should nevertheless affirm the judgment below because either the agreement did not survive the merger, or the Court Appeals for the District of Columbia had exclusive jurisdiction of the issue, or, finally, that there is no forum in which the Brotherhood can litigate the issue.

United's brief confirms the position of the petitioner as set forth in its brief (pages 21-28) that the survival of the collective bargaining agreement upon the consummation of the merger has, from the very beginning, been the basic issue in the dispute between the Brotherhood and United and that the complaint did not concern any controversy as to representation over which the National Mediation Board had jurisdiction.

Before turning to a consideration of United's argument, there is one other general observation which should be made with respect to the carrier's brief. Throughout the brief, United weaves into its arguments in one form or another the contention that the former Capital employees covered by the collective bargaining agreement in question, who became employees of United upon consummation of the merger, are better off under the unilaterally imposed regulations of United than they would be if any of their rights under the collective bargaining agreement are preserved. The argument ignores the fact that United's assertions are contradicted on the record. Paragraph 7 of the Affidavit of Mr. Charles L. Dennis, then a Vice Grand President of the Brotherhood and now Grand President of that organization, filed in the proceedings in the District Court, specifically denies the validity of United's assertions and sets forth the injury to the employees involved as a consequence of United's refusal to recognize any of their rights under the collective bargaining agreement. (R. 110-112.) The argument also ignores the fact that before the District Court United conceded that these matters were not of legal significance in the case (R. 110) and the Court of Appeals correctly held to the same effect. (R. 135, footnote 2.)

I

REPLY TO UNITED'S ARGUMENT THAT THE BROTHERHOOD-CAPITAL AGREEMENT DID NOT SURVIVE THE UNITED-CAPITAL MERGER.

United in its brief (pages 17-29) advances a number of reasons in support of its argument that the judgment of the Court of Appeals should be affirmed because the Brotherhood-Capital agreement did not

survive the merger of Capital into United. These arguments are discussed below:

A. United's Argument That the Brotherhood-Capital Agreement Did Not Survive the Merger as a Matter of Federal Law.

This Court in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964), held that as a matter of Federal law the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by that agreement. United's brief argues (pages 21-29) that this holding is not applicable to the Brotherhood-Capital agreement because of alleged differences between the situation in the Wiley-Interscience merger as compared to the United-Capital merger. The various phases of this argument are discussed below:

1. United's argument that the imposition of employee protective conditions by the Civil Aeronautics Board in approving the United-Capital merger satisfied the objectives of national labor policy underlying the decision in Wiley & Sons.

United argues (pages 21-24) that the imposition of employee protective conditions by the Civil Aeronautics Board in its order approving the merger of Capital into United meets the objectives of national labor policy which were set forth by this Court in *Wiley & Sons* as the basis for its holding that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all of the rights of the employees covered by the agreement. This argument is wholly without merit for the following reasons:

First, the Civil Aeronautics Board itself stated that its decision, which included the employee protective conditions upon which United relies, left the question of whether United was justified in ignoring the Brotherhood-Capital agreement to private litigation between the parties. (R. 50.) If the Board's order had had the broad effect for which United now contends, the Board would have obviously have so stated rather than advising that the parties should settle this matter between themselves as a matter of contract or labor law. Moreover, until now it has been United's position that continued effectiveness of the Brotherhood-Capital agreement could not be resolved under the Federal Aviation Act. (See page 26, *infra.*)

Second, the protective conditions imposed by the Board are not intended to secure to employees adversely affected by an airline merger the rights which those employees have under their collective bargaining agreement. The purpose of such conditions is basically to alleviate the adverse effects of displacements or dismissals from employment which may occur regardless of whether their contract rights are or are not continued by guaranteeing to the employees a minimum income for a limited period. While some of the benefits enjoyed by the employees involved prior to the merger are continued under such conditions for a limited time, not only are such rights limited in time but they cannot be equated with many of the contract benefits listed in the Affidavit of Mr. Dennis (R. 112).

Third, United's argument is simply an argument to the effect that the imposition of employee protective conditions supersedes private agreements between a carrier and its employees. The lack of validity of this argument is clearly demonstrated by the language of

the last sentence of Section 5(2)(f) of the Interstate Commerce Act (49 U.S.C.A. Section 5(2)(f), which specifically provides that the mandatory imposition of such conditions in railroad mergers shall not operate to extinguish the provisions of private agreements between carriers and their employees pertaining to the protection of the employees. It can hardly be contended that the voluntary imposition of such protective conditions by the Civil Aeronautics Board under a general statutory provision authorizing the Board to impose reasonable terms and conditions upon its orders approving airline mergers has a broader effect than the mandatory imposition of such conditions pursuant to Federal statute.

Fourth, United's argument is inconsistent with the practice in the case of mergers and consolidations in both the railroad and airline industries by which labor agreements continue in effect, although the Federal agency involved imposes employee protective conditions in approving such transactions. *City of Nashville* v. *United States,* 155 F. Supp. 98 (D.C. M.D. Tennessee, Nashville Division, 1957), aff'd Per Curiam 355 U.S. 63;[1] *Norfolk & Western Railway Company—Virginian Railway Company—Merger,* 307 I.C.C. 401;[2]

---

[1] Reference is made to Finding No. 15 (155 F. Supp. 102, 103) and the conclusions set forth at 155 F. Supp. 105 of the three-judge statutory court affirming the orders of the Interstate Commerce Commission approving the merger of the NC&StL into the L&N. These findings and conclusions specifically recognize that the agency's orders approving the merger, which include employee protective conditions, do not supersede rights under collective bargaining agreements.

[2] Reference is made to the assumption by the Norfolk & Western of the collective bargaining agreements of the Virginian Railway upon the merger of the two carriers, quoted at R. 113, which was a part of the record before the Commission in approving the merger.

Colonial-Eastern Acquisition Case, 23 C.A.B. 500 (1956).[3]

Fifth, United's motion to the District Court to dismiss the complaint or to grant it summary judgment (R. 45, 46) did not include any contention that the imposition of employee conditions by the Civil Aeronautics Board in effect superseded the Brotherhood-Capital agreement. (R. 45, 46.) The fact that after more than three years, United has suddenly come up with a new reason for depriving the employees involved of their contract rights, strongly suggests a lack of confidence in the merits of the reasons it has heretofore advanced in support of its position.

2. United's argument that the Brotherhood-Capital agreement did not survive the United-Capital merger because there was a substantial change in the employing enterprise.

United argues (pages 27-29) that the holding in the *Wiley & Sons* case does not preclude a holding that the Brotherhood-Capital collective bargaining agreement automatically terminated upon the United-Capital merger because of (a) the magnitude of such merger, and (b) the fact that Capital disappeared after the merger and its facilities and employees were completely absorbed by United. United asserts that a merger of this nature and magnitude is different from that involved in *Wiley & Sons.*

The mere fact that Capital and United were both larger companies than Interscience and Wiley ob-

[3] Reference is to Joint Exhibit No. 19 in the record of that proceeding providing for the assumption by Eastern of the collective bargaining agreements of Colonial upon the merger of those two air carriers appearing in the record at R. 117, 118; Affidavit of Charles L. Dennis, R. 113.

viously cannot serve as a basis for a holding that the Interscience agreement did not automatically terminate upon merger, whereas the Capital agreement did. This basic principle of law cannot rest upon the number of employees or the volume of business of the merged companies.[4]

Aside from the difference in the size of the companies involved, the record does not disclose any basic differences in the circumstances. In each case there was a collective bargaining agreement between a union and the company which subsequently merged itself into another company; the surviving corporation was the larger of the two companies; the employees involved became the employees of the surviving corporation; the business and operations of the non-surviving corporation were continued by the surviving corporation.[5]

United stresses that Capital disappeared after the merger. So did Interscience.

United emphasizes that it integrated the employees of the two companies, by which it simply means that some of the employees involved were assigned to stations on United's system prior to the merger. The decisions in *Wiley & Sons* do not indicate precisely the assignment of the Interscience employees by Wiley after the merger. However, United cannot, by its own unilateral decisions and actions with respect to the Capital employees, terminate the collective bargaining

[4] While Interscience and Wiley were much smaller companies than either Capital or United, they did conduct an annual business together of more than ten million dollars.

[5] United continued to fly Capital's routes, the only difference being that the planes were now United planes rather than Capital planes.

agreement. Otherwise, the continuance of the collective bargaining agreement and the rights of the employees thereunder is no longer a matter of law but rests in the sole discretion of the surviving corporation.

3. United's argument that the arbitration provisions of the Brotherhood-Capital agreement cannot be enforced because the Brotherhood has abandoned the right to arbitrate thereunder.

The memorandum for the United States as *amicus curiae* suggests that this Court should reverse the judgment below on the ground that the dispute between the Brotherhood and United is subject to the exclusive primary jurisdiction of an adjustment board created by Article 43 of the Brotherhood-Capital agreement. In this brief, *infra*, pages 28-35, the Brotherhood sets forth the reasons why a decision by this Court should not be so limited. United argues that the Brotherhood is not entitled to even such limited relief because it asserts (pages 24-27) that the Brotherhood has abandoned a right to arbitrate under the provisions of Article 43 of the collective bargaining agreement.

United argues (page 24) that the Brotherhood complaint in the District Court did not request enforcement of arbitration under Article 43, but rather that United be required to assume all of the obligations of the Brotherhood-Capital collective bargaining agreement. Paragraph 25 of the complaint (R. 10) alleged that United had violated the provisions of Section 204 of the Railway Labor Act by refusing to accept and process grievances in accordance with the collective bargaining agreement. The Brotherhood's prayer for relief to the District Court (R. 11) requested, *inter*

alia, that the District Court declare the legal rights of the parties with respect to the agreement. This obviously included the provisions of Article 43. Likewise, the prayer for relief asked the District Court to declare that United was bound by the provisions of the agreement and to enjoin that carrier from refusing to apply those provisions. Here, again, this included the provisions of Article 43 of the agreement. While it is true that the allegations of violations of the agreement were not limited to Article 43 nor was the request for relief limited to the enforcement of that Article (R. 9-11), that fact would not preclude the enforcement of Article 43 at this time either alone or along with other provisions of the Brotherhood-Capital agreement.

United argues (pages 24 and 25) that the Brotherhood is not entitled to the enforcement of Article 43 because the complaint does not allege that the Brotherhood has ever requested any arbitration of the provisions of that agreement. Paragraph 25 of the complaint, as indicated above (R. 10), alleges that United had violated its legal obligations by refusing to accept and process grievances of former Capital employees submitted to it in accordance with the provisions of the Brotherhood-Capital agreement. United contends that it is necessary for the Brotherhood to list each individual grievance and the specific grounds for refusal of each grievance. The Brotherhood submits that it is not required in seeking United's compliance with provisions of Article 43 to specify and spell out each individual grievance, particularly in the light of the carrier's position, which it continues to assert, that Article 43 terminated with the merger.

The complaint (R. 3-11) sets forth in detail the facts that the Brotherhood, beginning a few days after it

first learned of the merger agreement and continuing on up until the time that the complaint was filed, continuously tried to get United to assume the obligations of the Brotherhood-Capital agreement upon the consummation of the merger and to comply therewith, and that United consistently refused stating that the agreement automatically terminated upon the consummation of the merger. United does not suggest that its refusal to accept and process individual grievances under the agreement and to comply with Article 43 was based on any different ground.

United also argues that at any time after February 1, 1962, it could have terminated the Brotherhood-Capital agreement by the filing of a 30-day written notice of such intention,[6] and that therefore it cannot now be required to arbitrate claims never identified prior to termination of the agreement. United has, of course, not filed such a notice because to do so would involve a recognition on its part that the agreement continued after the merger. Moreover, even if United should now file such a notice, its obligations under the agreement would not terminate as of that date because it would have to first exhaust the procedures set forth in Section 6 of the Railway Labor Act with respect to such notice. During this period when the agreement has been in effect, unless terminated by the merger, United has been put on notice of specific claims through the filing of grievances which it refused to accept and process. (R. 10.)

---

[6] Article 44 of the agreement provides that it was to continue in effect until February 1, 1962, and "thereafter unless thirty (30) days written notice is served by either party signatory thereto as provided in the Railway Labor Act, as amended." (R. 36.)

Finally, United argues that the Brotherhood has abandoned the right to enforce Article 43 because it should have pursued its protests under that Article with Capital while the agreement was unquestionably in effect. There are a number of answers to this contention. The grievances invoking Article 43 which United has refused to accept and process are based upon actions of United and not upon actions of Capital. At most, the Brotherhood could have only processed grievances against Capital arising out of that carrier's violation of Article 1(b) of the agreement in not giving the required notice and not conducting negotiations in accordance with the last clause of that Article. A decision on such violations would not have decided the question of United's duty to assume the obligations of the agreement after the merger. The rights of the Brotherhood and its employees against Capital were separate and distinct from the rights asserted against United.[7]

4. United's argument that the Brotherhood-Capital agreement did not survive the merger because of provisions of that agreement.

United argues (page 17) that the Brotherhood-Capital agreement was entered into on the assumption that the Brotherhood would continue to be the sole and exclusive bargaining agent for all of the employees in the craft or class involved and that when this premise fell with the merger the entire contract fell. How-

[7] Since United's motion to dismiss the complaint in the District Court did not give rise to this question, the record does not disclose whether or not the Brotherhood did or did not attempt to invoke Article 43 with Capital. United, therefore, has no basis in the record for asserting that it did not. It would be shown, if this were of legal significance, that the Brotherhood did attempt to invoke Article 43 with a joint communication to Capital and United, dated May 29, 1961, and was unsuccessful.

ever, the contract which was the subject of litigation in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, also provided that the union involved should be the exclusive bargaining agent of the clerical and shipping employees of Interscience.[8] Yet, this Court held that such contract did not automatically terminate upon the merger of Interscience into the Wiley company in spite of the fact that thereafter the union did not represent the majority of the bargaining unit.[9]

United presents a variation of this same argument in its contention (page 17) that the union security provisions of the Brotherhood-Capital agreement cannot survive the merger because Section 2, Eleventh of the Railway Labor Act contemplates that such an agreement shall apply only where the union represents all the employees in the craft or class. The assumption that the union security provisions of the agreement cannot survive the merger because the Brotherhood no longer represents the majority of the craft or class is essentially the same assumption underlying the general argument that the entire agreement could not survive the merger. This argument, as we have seen, has been rejected by this Court.

B. United's Argument That the Brotherhood-Capital Agreement Did Not Survive the Merger as a Matter of Contract Law.

I. United's argument based on provisions of the Brotherhood-Capital agreement.

United argues (pages 17 and 18) that Article 1(b) of the collective bargaining agreement (R. 24) did not contemplate that the collective bargaining agreement

---

[8] This finding of fact appears in the opinion of the District Court in that case at 203 F. Supp. 171.

[9] See petitioner's brief, page 35, and the references there made to this Court's conclusions in *Wiley & Sons* as reported in 11 L.Ed. 2d at page 905.

should be binding upon a successor or assign of Capital in the case of a merger, but only that in the event of such transaction Capital was required to meet with the Brotherhood and treat on specified subjects, i.e. the procedure to be followed and the protection to be afforded the employees involved. United also suggests that the Brotherhood did not adequately pursue this requirement.

This argument ignores the fact that the obligation to meet and negotiate with the Brotherhood in the event of a consolidation or merger is set forth in Article 1(b) in the conjunctive and follows after a statement without qualification that all provisions of the agreement shall be binding upon successors or assigns of Capital. It is clearly an additional obligation imposed in the event of a consolidation or merger arising out of a recognition that in such circumstances the best interests of all the parties is served by such negotiations. United's argument also ignores the fact that the National Mediation Board, in the exercise of its jurisdiction under Section 5, Second of the Railway Labor Act to interpret the meaning of the Brotherhood-Capital agreement executed in mediation proceedings under the auspices of that Board, found that the provision in Article 1(b) that the agreement shall be binding upon successors and assigns of Capital "is clear and unambiguous" and that "the language means just what it says." (R. 44.)

United's suggestion (page 18) that the Brotherhood made no adequate effort to obtain compliance with the provision for negotiations pursuant to the last clause in Article 1(b) is refuted by the uncontradicted facts of record that the Brotherhood promptly sought to

implement the contractual provisions through negotiations with Capital and/or with United and that both carriers refused (R. 7, 108, 109), and that when Capital finally did meet with representatives of the Brotherhood following Civil Aeronautics Board hearings on the merger transactions, Capital's officer in charge of the matter advised that the carrier could not negotiate any arrangements which would be binding upon United. (R. 109.) The entire record in this case bespeaks the fact that both Capital and United rejected the Brotherhood's request. Capital's position was that the merger transaction left it no freedom of action and United's position was that it had no obligations of any kind under the Brotherhood-Capital agreement.

2. United's argument that it did not assume the obligations of the Brotherhood-Capital agreement in the merger contract.

Paragraph 10 of the complaint (R. 5, 6) alleges that United assumed the obligations of the Brotherhood-Capital agreement under Section 3, paragraph 1 of the merger contract.

United argues (page 19) that it did not voluntarily bind itself to the Brotherhood-Capital agreement. This argument ignores the provisions of the merger contract with Capital, quoted at page 5 of petitioner's brief, under which United subjects itself to "all debts, liabilities and duties of each of the Constituent corporations" and further provides that such liabilities and duties may be enforced against United to the same extent as if they had been incurred or contracted by United. (R. 5, 6.)

United suggests (page 19) that this assumption of liabilities was not applicable to the collective bargaining agreement involved because United consistently stated its intention not to assume the obligations of

such agreement, and that this announced intention constituted an agreed-upon interpretation of the contract between Capital and United. United could hardly change the provisions of its merger contract in such fashion. Moreover, both United and Capital were Delaware corporations and the law of that State, quoted at page 5 of petitioner's brief, also provided that a merger did not extinguish the liabilities of the corporations involved or the rights or remedies of persons doing or transacting business with said corporations. Finally, the assumption by United of the obligations of Capital is but a reflection of the general rule cited by this Court in *Wiley & Sons*, 11 L. Ed. 2d 904, footnote 3, that in the case of a merger the corporation which survives is liable for the debts and contracts of the one which disappears. This general rule is also cited by the United States Court of Appeals for the Ninth Circuit in its decision in *Wackenhut Corporation* v. *International Union, United Plant Guards of America*, 332 F. 2d 954.[10]

II

REPLY TO UNITED'S ARGUMENT THAT THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE DISTRICT COURT HAD NO JURISDICTION OVER THE SUBJECT MATTER OF THE COMPLAINT.

A. United's Argument That the Dispute Between the Brotherhood and United Is Not Justiciable.

United's brief argues (pages 30-39) that the judgment of the Court of Appeals was correct because the dispute between the Brotherhood and United is not

[10] Paragraph 11 of the complaint (R. 6) also alleges that United violated the provisions of Delaware General Corporation Law in refusing to assume the obligations of the Brotherhood-Capital agreement. United's brief does not address itself to this point. This State statutory provision is consistent with the national labor policy set forth in the *Wiley & Sons* decision.

justiciable. United concedes that the National Mediation Board would have no jurisdiction to determine the question of the applicability of the Brotherhood-Capital agreement to United. (Resp. Br. 30.) However, it says that underlying this dispute was a controversy concerning the representation of certain of the former Capital employees taken over by United with the consequence that the dispute concerning the applicability of the agreement is not justiciable.

The representation dispute which United asserts underlies the question of the applicability of the agreement is an alleged dispute between the Brotherhood and the International Association of Machinists (IAM) respecting the representation of approximately 530 employees out of the 2700 Capital employees covered by the Brotherhood-Capital agreement. In its brief (pages 34, 35) the Brotherhood pointed out that there has been no dispute between the Brotherhood and the IAM concerning the representation of these 530 employees on the property of United and that the IAM agrees that there is no such dispute. Such a dispute would exist only if the Brotherhood sought to have declared invalid the agreement of June 23, 1961, attached to United's affidavits filed in the District Court, under which the employees involved were placed under the IAM-United basic collective bargaining agreement. The Brotherhood did not ask the District Court to declare this agreement invalid and it has not asked anybody to so declare.

United suggests in its brief (page 35) that the Brotherhood must have a dispute with the IAM over the representation of these employees because if it does not, it is seeking to enforce an agreement different from the one set out in the complaint in the District

Court. However, as petitioner's brief points out (page 34) the complaint seeks to establish that United's obligations under the Brotherhood-Capital agreement did not terminate upon the consummation of the merger on June 1, 1961, and that United assumed the obligations of such agreement on that date. Thus, the Brotherhood does seek to enforce the agreement. If United at some point subsequent thereto in accordance with the provisions of the Railway Labor Act took action placing a portion of the employees involved under another agreement, the Brotherhood's enforcement of the Brotherhood-Capital agreement as to those employees up to that date would not involve any representation dispute with any other organization nor would it involve enforcement, as United alleges, of a different contract. The reason for this is that change in representation rights does not change contract rights. Even if all 2700 of the employees involved were represented on United by the IAM, both United and the IAM would have an obligation under the Railway Labor Act to continue the rights of those employees under the Brotherhood-Capital agreement until such time as the IAM and United, in accordance with the provisions of that statute, substituted different contract rights. Such has been the administration of the Railway Labor Act for more than 30 years by the National Mediation Board, as clearly appears at pages 24 and 25 of its published document, entitled "Administration of the Railway Labor Act by the National Mediation Board, 1934-1957". The Board there states that a change in representation does not bring about a change in contract rights until the agreement is changed in accordance with the provisions of the Railway Labor Act. Its statement on this point reads as follows:

"*Change of representatives under existing agreements.*—When there is an agreement in effect between a carrier and its employees signed by one set of representatives and the employees choose new representatives who are certified by the Board, the Board has taken the position that a change in representation does not alter or cancel any existing agreement made in behalf of the employees by their previous representatives. The only effect of a certification by the Board is that the employees have chosen other agents to represent them in dealing with the management under the existing agreement. *If a change in the agreement is desired, the new representatives are required to give due notice of such desired change as provided by the agreement or by the Railway Labor Act.* Conferences must then be held to agree on the changes exactly as if the original representatives had been continued. *The purpose of such a policy is to emphasize a principle of the Railway Labor Act that agreements are between the employees and the carrier, and that the change of an employee representative does not automatically change the contents of an agreement.*" (Emphasis supplied.)

This fact has been recognized in every railroad and every airline merger up to this time.

The application of this principle to the 530 ramp and stores employees placed under the IAM-United agreement on June 23, 1961, is obscured by the dates involved. If this action had not taken place for a year, then it would be clear that these employees had rights under the Brotherhood-Capital agreement prior thereto. On the other hand, if the action had taken place on June 1, 1961, then any rights of these employees under the Brotherhood-Capital agreement would not have continued.

In the latter situation, it would be clear that this fact would not prevent the Brotherhood from enforcing the agreement as to the other approximately 2170 employees involved. The fact that the action took place on June 23, 1961, does not prevent the Brotherhood, contrary to United's contentions, enforcing the agreement as to these employees. Nor does it prevent the Brotherhood from obtaining a declaratory judgment that the agreement would not expire as to any of the 2700 employees on June 1, 1961.

United's brief (page 34) refers to the pending application of the Brotherhood to the National Mediation Board for a certification to represent the craft or class of employees of United, of which the employees here involved are a part, as evidence of a jurisdictional dispute between the Brotherhood and the IAM. It also cites certain portions of the record in Cases Nos. 138, 139 and 369 before this Court, involving separate litigation concerning this application in support of its contentions. The memorandum of the United States (pages 8, 9) correctly points out that this application has no bearing upon the present litigation because it involves only the question of future representation and does not affect the existing rights of either the Brotherhood or the employees it represents under the Brotherhood-Capital agreement. Moreover, the original Brotherhood application excluded the ramp and stores employees of United and these were included in the application only after United, by letter of September 7, 1962, requested a dismissal of the application on the ground that it covered only a part of a group of the employees constituting the craft or class followed thereafter by a similar objection from the IAM. The Brotherhood's statement to the National Media-

tion Board that the IAM was "collaborating with the management of United by also raising the question as to the appropriateness of the craft or class", quoted in part in United's brief (page 34), referred only to these requests.[11] The IAM states that there is no dispute between it and the Brotherhood in the subject matter of the present litigation. (R. 122.)

United's brief makes reference to the decision in *Ruby* v. *American Airlines*, 323 F. 2d 248 (CA 2, 1963), *cert. den.* 376 U.S. 913, as supporting its position. However, this case related to the duty of an employer to negotiate a new contract in a situation where there was a representation dispute covering the employees involved. It has no application to United's obligation to recognize rights under the existing Brotherhood-Capital agreement. (See *John Wiley & Sons, Inc.* v. *Livingston*, 11 L. Ed. 2d 898, at page 905.)

United suggests (page 39) that the issues raised by the complaint are not justiciable for the additional reason that the Brotherhood-Capital agreement contained a union security provision so that it is not possible to now ascertain which Capital employees covered by the agreement voluntarily joined the Brotherhood and which did not, and it contends that there is doubt as to whether the Brotherhood may enforce the agreement with respect to employees who joined the union under the compulsion of the union security provision. The rights of the employees under the agreement are not dependent upon their membership in the Brotherhood. United's argument thus is essentially that the Brotherhood may not enforce those rights because it has lost its status as the majority representative. This argument is dealt with *infra*, pages 22-24.

---

[11] Case No. 139, J.A. 38, 39, 44, 47-49.

B. United's Argument That There Is No Federal Jurisdiction Because of the Minority Status of the Brotherhood.

United's brief argues (pages 40-44) that the Brotherhood-Capital agreement terminated with the consummation of the United-Capital merger because thereafter the 2700 employees involved were a minority of the entire craft or class on United. The brief recognizes (page 40) that this Court held in *Wiley & Sons* that Interscience's union minority status at Wiley did not prevent it from representing the employees under the Interscience contract following the merger of Interscience-Wiley. However, United says that a different rule must be established here because the *Wiley* case arose under Section 301 of the Labor-Management Relations Act while the present suit arose under the Railway Labor Act.

United argues that the union was able to bring a suit to enforce the contract involved in the *Wiley & Sons* case even though it had a minority status in the Wiley company because Section 301 of the Labor-Management Relations Act permits suits by minority representatives. United contends on the other hand that if the relief requested by the Brotherhood were granted United would be required to treat with a representative of a minority of a craft or class of its employees and that under the Railway Labor Act it may be compelled to deal only with a representative designated by the majority of such employees. United says that it could voluntarily treat with the Brotherhood for the employees involved but that it cannot be required to do so.

United cites in support of its contention provisions of the Railway Labor Act which contemplate that collective bargaining agreements shall be made between

carriers and the representatives of a majority of the craft or class, the legislative history of such provisions, and the decision in *Virginian Railway Co.* v. *System Federation*, 300 U.S. 515, to the effect that where a majority representative exists a carrier subject to the Railway Labor Act must treat with that representative but that if no majority representative has been selected the carrier is free to make a contract with anyone it pleases and for any group it pleases within the craft or class. The provisions of the Railway Labor Act cited by United as well as the *Virginian* decision all deal with the problem of the duty of a carrier subject to the Railway Labor Act in negotiating a new agreement with representatives of its employees. A similar requirement exists in Section 9(a) of the Labor-Management Relations Act (with the special exception of employees engaged in the building and construction industry covered by Section 8(f) which is given special treatment because of its unique position). Consequently, the fact that United cannot be compelled to make a new agreement with a representative of a minority does not in and of itself establish that the carrier cannot be compelled in a suit by that representative to assume obligations under an already existing agreement.

United's argument really boils down to a contention that the suit may not be brought because there is no provision similar to Section 301(a) in the Railway Labor Act. This argument ignores the fact that the Brotherhood itself has rights under the agreement and it would also give rise to a situation where although the agreement did not terminate with the merger of Capital into United, the latter could escape obligations thereunder because a suit to enforce obligations

would have to be brought by a particular employee dealing only with one very narrow segment of the agreement. Such suits would be precluded by the potential expense and the ever-present fear of the employer. This Court, in its decision in *International Association of Machinists* v. *Central Airlines*, 372 U.S. 682, recognized that a suit by employee representatives would lie in the Federal court to enforce a Railway Labor Act contract. There is no reason to restrict that right like the one here involved to a majority representative where the suit does not seek the negotiation of a new agreement, but asserts rights based upon an existing collective bargaining agreement. This Court in *Wiley & Sons*, 11 L. Ed. 2d at page 905, pointed out that it was not deciding a union's right to claim continued status following a change in ownership, but it was enforcing rights growing out of the existing agreement.

Finally, United's brief concedes (page 44) that the Brotherhood could maintain an action based on diversity of citizenship. Paragraph 2 of the complaint (R. 3) based jurisdiction in part upon Section 1332 of Title 28 of the United States Code and alleged that full diversity of citizenship existed between the Brotherhood and United. Thus, assuming *arguendo* that United's argument is sound, there was jurisdiction in the District Court.

C. United's Argument That the Question of the Applicability of the Brotherhood-Capital Agreement After the Merger of Capital Into United Should Have Been Left With the Court of Appeals for the District of Columbia Circuit.

United's brief argues (pages 45-48) that the issues presented by the complaint could have been litigated before the United States Court of Appeals for the District of Columbia Circuit on appeal from the order of the Civil Aeronautics Board which refused the request of the Brotherhood to include as a condition of the agency's approval of the United-Capital merger the assumption by United of the obligations of the Brotherhood-Capital agreement. United asserts that the Court of Appeals for the District of Columbia could have considered every issue raised in this litigation and that as a consequence the Brotherhood abandoned its claim when it withdrew its petition with the Court of Appeals for the District of Columbia.

It should first be observed that United did not request the District Court to dismiss the complaint upon this ground. (R. 45, 46.) Nor did it seek to sustain the judgment of the District Court and the Court of Appeals on this ground as is clearly apparent from the decision of the Court of Appeals. (R. 131-138.) The suggestion first appeared in its brief in opposition to the petition for certiorari (page 16) and then only in the form of a contention that the Brotherhood did have a forum other than the District Court to resolve the dispute with United. Thus, United has made this argument for the first time only after some three and a half years after the Board's order was issued and after the Brotherhood commenced its efforts to enforce the Brotherhood-Capital agreement. If there has been any abandonment of a claim, it has been the abandonment by United of this argument.

The Brotherhood tried to obtain a judicial determination that the Brotherhood-Capital agreement was binding on United following the merger in the proceedings before the Civil Aeronautics Board. When the Board declined to impose a condition directing United to assume the obligations of the agreement, the Brotherhood did seek review of the Board's order for the purpose of obtaining such a judicial determination. However, the Board specifically advised the District of Columbia Court of Appeals that it had not passed on the issue of whether United would be justified as a matter of contract or labor law in ignoring the agreement. (R. 50.) It was thus clear that the Brotherhood could not obtain a judicial determination by the District of Columbia Court of Appeals of the continued effectiveness of the Brotherhood-Capital agreement. It therefore sought to do so by filing an application with the National Mediation Board for an interpretation of the agreement and when that Board held that it did not have jurisdiction to determine the question, the Brotherhood filed the present action.

The Board's declination to pass upon the issue was in response to an argument made by United in its brief, dated January 23, 1961, to the Board (page 36) in which United stated "the legal question as to the effectiveness of Capital's collective bargaining agreements is not one for resolution by the Board under the Federal Aviation Act." United's present argument is directly inconsistent with this position.

It is thus clear that the complaint in the District Court is not a collateral attack on the Civil Aeronautics Board order approving the merger. The Department of Justice, which has the duty of defending Board

orders, would be the first to advance this claim if it had any substance.

Nor is United helped by the decision in *Holman* v. *Southern Airways, Inc.*, 210 F. Supp. 407, cited at page 47 of its brief. In that case, the plaintiffs brought an action in a Federal district court to enjoin Southern Airways and the Air Line Pilots Association from putting into effect a collective bargaining agreement which the complaint alleged had been entered into pursuant to orders of the Civil Aeronautics Board. The complaint alleged that the orders of the Board were invalid and hence the agreement was invalid. The District Court correctly held that validity of an order of the Civil Aeronautics Board could be challenged only before an appropriate Court of Appeals. If anything, the litigation of which the *Holman* case was a part supports the position of the Brotherhood because the District of Columbia Court of Appeals subsequently held that the petition before it sought, not to challenge the Board orders, but to obtain a declaration as to the validity of the collective bargaining agreement to which Holman, et al., objected. *Southern Pilots Assoc.* v. *C.A.B.*, 323 F. 2d 288, *cert. den.*, 376 U.S. 954. In the present case, the Brotherhood has not challenged directly or indirectly the Board orders. It seeks only to enforce the Brotherhood-Capital agreement. The District Court is the proper forum for such an action.

REPLY TO MEMORANDUM FOR THE UNITED STATES

The United States has filed a memorandum as *amicus curiae*. In this memorandum, the United States agrees with the position of the Brotherhood that the District Court and the Court of Appeals erred in deciding that the controversy between the Brotherhood and United concerned a representation dispute over

which the National Mediation Board has exclusive jurisdiction under Section 2, Ninth of the Railway Labor Act. The United States agrees that the controversy is over the present effect of a contract negotiated by a representative previously selected by Capital employees and that the District Court has jurisdiction to entertain the complaint. The United States, therefore, urges this Court to reverse the judgment below and to remand the cause to the District Court.

The memorandum of the United States, however, takes the position that the adjustment board provided for by Article 43 of the Brotherhood-Capital agreement (R. 32) has exclusive primary jurisdiction of the dispute between the Brotherhood and United over the present effect of the Brotherhood-Capital agreement. It, therefore, suggests that judicial consideration of the case at this time should not go beyond a declaration that the dispute between the Brotherhood and United is amenable to arbitration under such adjustment board. The Brotherhood submits that judicial consideration of the case should not be so limited and that it is entitled to a declaratory judgment that the Brotherhood-Capital agreement did not terminate upon consummation of the United-Capital merger but continued in full force and effect and was binding upon United. The Brotherhood sets forth the following reasons in support of this position as against the limited relief urged by the United States:

A. The Decision in Wiley & Sons Does Not Preclude the Grant of Relief Requested by the Brotherhood.

This Court, in the *Wiley & Sons* case, held that a collective bargaining agreement of Interscience covering employees of that company did not automatically terminate upon the merger of Interscience into the

Wiley Company and that the union was entitled to arbitrate with Wiley Company several issues relating to the obligation of the Wiley Company to the former Interscience employees under such agreement. The action was one only to compel arbitration and this Court was not called upon to limit the relief in a situation like the present one where the Brotherhood seeks to enforce the collective bargaining agreement. Moreover, the agreement in that case had expired while the Brotherhood-Capital agreement is still in full force and effect if it was not terminated by the merger. (R. 36.)

B. The Merger Contract Provided That United Would Assume All the Debts, Liabilities and Duties of Capital.

Section 3, paragraph 1 of the merger contract between Capital and United, provided that United would assume all the debts, liabilities and duties of Capital and that these could be enforced against United to the same extent as if said debts, liabilities and duties had been incurred or contracted by United. No sound reason exists why the obligations and duties of Capital under its collective bargaining agreement with the Brotherhood should be removed from the liabilities and duties which United had assumed under the contract. That carrier's declaration after the agreement was signed and before the Civil Aeronautics Board approved the merger that it would not assume the obligations of the Brotherhood-Capital agreement does not change the effect of its contract with Capital. The decision in *Wiley & Sons* also does not deal with any such provision.

This is a matter for judicial determination and not arbitration under the Brotherhood-Capital agreement.

C. Delaware Law Required United to Assume the Obligations of the Brotherhood-Capital Agreement.

Both Capital and United were Delaware corporations and their merger agreement was made pursuant to Delaware law. Delaware General Corporation Law provides that liabilities of corporations existing under the laws of that State shall not, in any way, be lessened by the consolidation or merger of two or more corporations.[12] (R. 4-6.) In *Wiley & Sons* the union had alternately relied on the New York Stock Corporation Law. While this Court held that the question of the survival of the collective bargaining agreement was a matter of Federal law, it also said that "State law may be utilized so far as it is of aid in the development of correct principles or their application in a particular case."[13]

There was no suggestion by the Court that the New York law, which was similar in scope to Delaware law, was applicable only to duties and obligations of a corporation other than those arising out of labor contracts. In the present case the Delaware law supports the position of the Brotherhood and, barring some overriding principle of Federal law, should be applied to require United to assume the obligations of the Brotherhood-Capital agreement. It is submitted that no such overriding Federal principle exists.

This again is a matter for judicial determination and not for arbitration.

---

[12] This Delaware statute is quoted at page 44 of the Brotherhood's brief.

[13] 11 L.Ed.2d at page 904.

D. The Brotherhood-Capital Agreement Itself Provided That It Should Be Binding Upon United.

Article 1(b) of the collective bargaining agreement (R. 24) provided that all provisions of this agreement "shall be binding upon the successors or assigns of the Company." The National Mediation Board, pursuant to its authority under Section 5, Second of the Railway Labor Act to interpret the meaning of agreements executed in mediation, found that the language of the agreement was clear and unambiguous and meant just what it said. (R. 44.) This is a provision for which the Brotherhood bargained in negotiations under the Railway Labor Act with Capital and in anticipation of a transaction by which Capital would be purchased, consolidated, or merged with some other airline, and the Brotherhood is entitled to the enforcement of this provision unless there is some rule of law which prevents this. While it is true that United was not a party to the original Brotherhood-Capital agreement, it was put on notice by the Brotherhood of this provision within a few days after the merger contract was signed and long before the Civil Aeronautics Board approved the merger and it was consummated. It is, therefore, submitted that United proceeded with the merger with full knowledge of this provision and of the Brotherhood's position with respect thereto and as a consequence should not now be relieved from the obligations of Article 1(b) simply because it was not a party to the original contract. There was no similar contract provision in the Interscience agreement which was the subject of litigation in the *Wiley & Sons* case, so that the Court was not called upon to determine the effect of such a provision. United in its brief argues that this provision was not applicable to a merger. The reply to this argument is set forth, *supra*, pages 13, 14.

E. Limiting the Brotherhood's Relief Would Defeat the Objectives of Federal Law.

In *Wiley & Sons*, this Court stated that the objectives of national labor policy require that the right of owners of businesses to merge be balanced by some protection to the employees from the sudden change in the employment relationship. In that case, the objectives were met by granting the relief requested by the union of requiring the surviving corporation in the merger to arbitrate its continued obligations with respect to certain provisions of the agreement. It is submitted that these objectives would be defeated by limiting the Brotherhood to such relief in the present case.

Article 43, like all similar provisions, is designed to set up a procedure for the processing of grievances of individual employees. The interpretation or application of a collective bargaining agreement is simply incidental to the determination of the grievance. Thus, Article 43 contemplates a submission which shall include (1) the name of the employee, (2) efforts to obtain adjustment under Articles 30 and 31, which deal with individual grievances, (3) the nature of the dispute, and (4) the position or contention of the Brotherhood. (R. 29-33.) If the Brotherhood is limited to the relief suggested by the United States, the only questions respecting the interpretation and application of the Brotherhood-Capital agreement that will be submitted for determination by a board of adjustment under Article 43 will be those grievances which have been submitted to United and which the carrier refused to accept.

The only way that justice and the national labor policy can be achieved in the present situation is to

declare that the collective bargaining agreement did not terminate upon consummation of the merger and to require United to negotiate with the Brotherhood under Article 1(b) thereof for the procedure to be followed and the protection to be afforded the employees involved. A contrary rule would involve a manifest injustice to the employees and the Brotherhood and, as the Second Circuit observed in the *Wiley & Sons* case, "would be a breeder of discontent and unharmonious relations between employer and employees."[14]

F. Limiting of the Brotherhood Relief Would Be Inconsistent With Established Practices Under the Railway Labor Act.

The established practice under the Railway Labor Act over the years has been that, whenever a railroad or an airline merges, the surviving corporation assumes the obligations of the collective bargaining agreement and negotiates with the union to determine all questions and problems arising therefrom under the merger. This practice in the railroad industry is attested to in the record by the Affidavit of Mr. Dennis based on 30 years of experience in that industry, which reads in pertinent part as follows (R. 113):

> "My lengthy experience in the railroad industry, as indicated in paragraph 3 of this affidavit, has made me familiar with the practices and procedures of railroads in cases of mergers and consolidations. It is the customary practice in the railroad industry in the cases of mergers and consolidations for the surviving corporation to assume the collective bargaining agreements of the non-surviving carrier and then to work out the application thereof through implementing agreements

[14] 313 F. 2d 52, at page 56

such as is contemplated by Article 1(b) of the Agreement of August 3, 1959, here involved."

Examples of this practice in the airline industry appear in the record at R. 117-121. The Brotherhood knows of no instance in which a surviving carrier has taken the position that it would not assume the obligations of a collective bargaining agreement until United refused to do so in the present case.

If the Brotherhood was required to arbitrate with United the question of the survivorship of various provisions of the Brotherhood-Capital agreement following the merger, such a decision would be contrary to the long standing practice in the railroad and airline industries and be the cause of confusion and litigation. This result is not called for by the decision in *Wiley & Sons* or by any other principle of Federal law. To the contrary, it would defeat the objectives of Federal law enunciated in *Wiley & Sons*.

G. United Should Be Required to Negotiate With the Brotherhood Under Article 1(b) of the Brotherhood-Capital Agreement.

Assuming *arguendo* that the relief granted to the Brotherhood should be limited to a determination as suggested by the memorandum of the United States, the Brotherhood submits that United should also be required to meet and negotiate with the Brotherhood in good faith with respect to the application of the collective bargaining agreement prior o any arbitration. Article 1(b), in accordance with the prevailing practice in the railroad and airline industries, provided for negotiations concerning the procedure to be followed and the protection to be afforded employees involved in the case of a merger or consoli-

dation of Capital with another airline. No useful purpose would be served in requiring the Brotherhood and United to arbitrate questions concerning the continuation of the Brotherhood-Capital agreement following the merger if the dispute between the Brotherhood and United could be solved by good faith negotiations pursuant to A ticle 1(b). Such negotiations have never taken place because United could not undertake such negotiations in the light of its position that the Brotherhood-Capital agreement terminated with the merger. To require United to now undertake such negotiations would be consistent with the entire tenor of the Railway Labor Act, which requires carriers and employees and their representatives to make every reasonable effort to settle disputes between them through meetings and conferences with arbitration merely a last resort. Indeed, Section 3 of the Railway Labor Act requires such handling of disputes prior to any submission to the National Railroad Adjustment Board and Article 43 itself contemplates such efforts of adjustment prior to the use of the adjustment board procedures provided by that Article. (R. 33.) Thus, it is submitted that if the Court agrees with the position set forth in the memorandum of the United States, that it should not only declare that the dispute between the Brotherhood and United is amenable to arbitration under the adjustment board procedures provided by Article 43 but make it clear that United is required in good faith to attempt negotiations to adjust its dispute with the Brotherhood prior to the invocation of arbitration before such board.

CONCLUSION

Upon the basis of the points and authorities in the petitioner's brief and its reply brief, it is submitted that the judgment of the Court of Appeals should be reversed upon the grounds (1) that the dispute between the Brotherhood and United, set forth in the complaint in the District Court, did not give rise to a representation controversy within the exclusive jurisdiction of the National Mediation Board but to a dispute concerning the present status of the Brotherhood-Capital agreement, (2) that the Brotherhood-Capital agreement did not terminate upon the consummation of the United-Capital merger, and (3) that the Brotherhood is entitled to enforcement of that agreement, including, but not limited to, a requirement that United negotiate in good faith with the Brotherhood in accordance with Article 1(b) thereof.

Respectfully submitted,

EDWARD J. HICKEY, JR.
JAMES L. HIGHSAW, JR.
620 Tower Building
Washington 5, D. C.
Counsel for Petitioner Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes

Of Counsel:

MULHOLLAND, HICKEY & LYMAN
620 Tower Building
Washington 5, D. C.

October 16, 1964